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IN THE SUPREME COURT OF THE UNITED STATES

No. 89-5346

October Term, 1988

WILLIAM J. BRADLEY,

PETITIONER,

VS.

STATE OF OHIO,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On February 10, 1984, the Scioto County Grand Jury returned an indictment charging the petitioner, William J. Bradley, with the offense of aggravated murder, a violation of section 2903.01 (A) of the Ohio Revised Code. The indictment alleged that on or about February 2, 1984, the defendant, an inmate at the Southern Ohio Correctional Facility, did purposely and with prior calculation and design cause the death of Eric Bowling, the sixty-two year old civilian supervisor of the institution's sheet metal shop. The indictment also contained two capital specifications of aggravating circumstances: first, that the offense was committed while the defendant was a prisoner in a detention facility, O.R.C. §2929.04(A)(4); and second, that prior to the offense at bar, the defendant had been convicted of an offense an essential element of which was the purposeful killing of another, R.C. §2929.04(A)(5).

The defendant was arraigned in the Court of Common Pleas of Scioto County, Ohio, on March 2, 1984, at which time he entered a plea of not guilty and the court appointed two local attorneys to represent him. Shortly thereafter, the court ordered the Shawnee Forensic Center to conduct a mental evaluation of the defendant in order to determine his competency to stand trial. The examiner reported to the court that despite the presence of a well-systematized delusional system of thinking, previously diagnosed as paranoid schizophrenia, the defendant was competent to stand trial. Subsequently, at the request of defense counsel, the court appointed an independent psychiatrist of their choice to conduct additional evaluations of the defendant to determine both his competency to stand trial and his mental condition at the time of the offense. His report confirmed the diagnosis of chronic paranoid schizophrenia but concluded that the defendant was nonetheless competent to stand trial.

The defendant also filed a plea of not guilty by reason of insanity, whereupon the court ordered the Shawnee Forensic center to conduct an evaluation of the defendant in order to determine his mental condition at the time of the offense. Although both the consulting psychiatrist to the forensic center and the defendant's independent psychiatrist found that the defendant was mentally ill, they were unable to conclude that the offense was a product of his mental illness.

On May 6, 1985, the process of jury selection was commenced. A jury was seated on May 13, 1985, and presentation of evidence began the following day. The state's evidence tended to show that the defendant, upset about being assigned to work full-time in the sheet metal shop, entered the shop at the beginning of the work day on February 2, 1984, selected a piece of metal approximately three feet by three inches by one-quarter inch, and used it repeatedly to strike Eric Bowling about the head and the neck, causing him numerous injuries, several of which would have caused his death independently of the others. The defendant, at trial, denied all knowledge of, or participation in, the murder.

On May 16, 1985, the jury returned a verdict finding the defendant guilty of aggravated murder and the first specification. On May 20, 1985, prior to the sentencing phase of the trial, the court determined that the defendant had previously been convicted of first-degree murder and found the defendant guilty of the second specification. Pursuant to the defendant's request under R.C. §2929.03(D)(1), the court required a mental examination, but not a pre-sentence investigation, to be made. The report of this examination was submitted to the court on May 20, 1985, at which time the defendant presented the testimony of the forensic center psychiatrist in mitigation.

Upon consideration of the relevant evidence presented at trial, the testimony offered in mitigation, the arguments of

counsel, and the report of the mental examination of the defendant, the jury determined beyond a reasonable doubt, pursuant to R.C. §2929.03(D)(2), that the aggravating circumstances the defendant was found guilty of committing outweighed any mitigating factors; accordingly, the jury recommended to the court that the sentence of death be imposed upon the defendant. In a decision filed May 28, 1985, pursuant to R.C. §2929.03(D)(3), the trial judge filed an opinion in which he reached the same conclusions as the jury, and the death sentence was imposed.

The Court of Appeals of Scioto County, Fourth Appellate District of Ohio, in a unanimous decision, overruled the appellant's fifty-six assignments of error, found that the aggravating circumstances clearly outweighed one mitigating factor, and determined the sentence of death to be appropriate. Accordingly, the judgment of the trial court was affirmed.

On appeal to the Supreme Court of Ohio, the appellant submitted forty-four propositions of law in seeking reversal of the conviction and/or modification of the sentence. The Ohio Supreme Court's opinion, affirming the judgment below, is reported at 42 Ohio St. 3d 136 (1989).

A petition has been filed in this Court, praying that a writ of certiorari issue to the Supreme Court of Ohio, and seeking this Court's review of four questions.

REASONS FOR DENYING THE WRIT

I

OHIO'S DEATH PENALTY STATUTES DO NOT CONSTITUTE A "MANDATORY CAPITAL SENTENCING SCHEME" AND DO NOT PREVENT A JURY FROM DECIDING WHETHER DEATH IS THE APPROPRIATE PUNISHMENT FOR THE OFFENDER.

The petitioner has stated correctly, and this Court has made clear repeatedly, that mandatory death penalty schemes are invalid "because they fail to give the jury the opportunity to consider the character and individual circumstances of a defendant prior to the imposition of a death sentence." (Petition for Writ of Certiorari, p. 7). Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Sumner v. Shuman, 483 U.S. 66 (1987). In Lockett v. Ohio, 438 U.S. 586 (1978), this Court invalidated a former Ohio statute which mandated imposition of the death penalty, upon proof of an aggravating circumstance, unless one of three specific statutory mitigating factors were present. The plurality opinion stated that, under the Eighth and Fourteenth Amendments to the United States Constitution, a capital sentencer must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id., at 604. Consequently, present Ohio law instructs the sentencer to weigh against the aggravating circumstances not only six specific statutory mitigating factors which may be present but also "(a)ny other factors that are relevant to the issue of whether the offender should be sentenced to death." O.R.C. §2929.04(B)(7). The statute further provides that the defendant "shall be given great latitude in the presentation of evidence of the factors listed ... and of any other factors in mitigation of the imposition of the death penalty." O.R.C. §2929.04(C).

Nevertheless, the petitioner has characterized Ohio law as a "mandatory capital sentencing scheme," quoting from O.R.C. §2929.03(D)(2), which provides in part that "(i)f the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender," and O.R.C. §2929.03(D)(3), which provides in part that "if, after receiving ... the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt ... that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender."

The petitioner's argument, i.e., that the use of the word "shall" renders the capital sentencing scheme mandatory, is an illusory one. The statutes provide that the death sentence "shall" be imposed if but only if the sentencer determines, after considering and weighing any and all mitigating evidence the defendant chooses to offer, that the sentence of death "should" be imposed. Such a scheme is hardly mandatory. Where, as in Ohio, the defendant is allowed to present all relevant mitigating evidence to the sentencer, and the sentencer is able to consider and give effect to that evidence in imposing sentence, there is no mandatory sentencing scheme; on the contrary, this Court has stated that when those two conditions are met, one can "be sure that the sentencer has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence." Penry v. Lynaugh, 492 U.S. _____, 106 L. Ed. 2d 256, 57 USLW 4958, at 4962 (1989).

The Ohio statutes, and the jury instructions derived therefrom, do not "prevent the jury from determining the appropriate

punishment," as argued by the petitioner; rather, they ensure that the jury will make a determination of the appropriate punishment. The petitioner's argument is untenable when one considers the nature of aggravating circumstances, the nature of mitigating factors, and the function of the process of weighing the two against each other. Aggravating circumstances are those considerations which militate in favor of the death penalty, i.e., which tend to suggest that death is the appropriate penalty. Mitigating factors are those considerations which militate against the death penalty, i.e., which tend to suggest that death may not be the appropriate penalty. The process of weighing mitigating factors against aggravating circumstances is, therefore, a determination of the appropriateness of the punishment. A determination that the mitigating factors are outweighed by the aggravating circumstances is a determination that death is the appropriate penalty. A capital sentencing scheme based upon such a weighing process is not a mandatory one but is, rather, one which has been designed to ensure that the requisite individualized sentencing determination will be made.

II

STRICKLAND V. WASHINGTON PROVIDES THE STANDARD FOR REVIEW OF THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL AS WELL AS IN COLLATERAL PROCEEDINGS, AND THAT STANDARD NEEDS NO RE-EXAMINATION.

In Strickland v. Washington, 466 U.S. 668 (1984), this Court established a two-part test to be applied in reviewing claims of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant

> of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id., at 687. The second prong of the Strickland v. Washington test requires a defendant to establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694. The petitioner has sought a reexamination of this requirement. Alternatively, he has argued that application of the second prong of the Strickland v. Washington test is or should be limited to collateral proceedings, thus allowing a defendant to prevail on direct appeal without a showing of demonstrable prejudice.

The standard established in Strickland v. Washington needs no reexamination. Nothing in the opinion remotely suggests that this Court intended to limit its application to collateral proceedings. Such a limitation would be manifestly unreasonable. The petitioner has articulated no rational basis for requiring petitioners in collateral proceedings to demonstrate prejudice while allowing appellants to obtain reversals without such a showing. He has endeavored to justify such a distinction merely by bemoaning the difficulty of proving his claim while limited to the record, noting that "(i)n collateral proceedings ... the introduction of additional facts outside the record can at least aid in the ineffectiveness claim." (Petition for Writ of Certiorari, p. 11). Apparently, he would require petitioners in collateral proceedings to establish their claims because they have a more realistic opportunity to do so, while he would require appellate courts to assume that direct appellants would have established their claims had they been afforded a similar opportunity. In substance, he has argued that he should be given a fair chance to win on direct appeal regardless of the demonstrability of his claim.

If the petitioner's claim is demonstrable in collateral proceedings but not on direct appeal, then it is in collateral proceedings, and not on direct appeal, that he should prevail.

III

A JURY INSTRUCTION WHICH DIRECTS SENTENCING JURORS TO CONSIDER ALL OF THE EVIDENCE AND MAKE THEIR FINDING WITHOUT BIAS, SYMPATHY, OR PREJUDICE, IS NOT MISLEADING AND DOES NOT ENCOURAGE JURORS TO DISREGARD MITIGATING EVIDENCE.

At the sentencing phase of the trial, the following statement was included in the charge to the jury:

> You should consider all of the evidence, and you should make your finding with intelligence and impartiality and without bias, sympathy, or prejudice, so that the State of Ohio and this defendant will feel that their case was fairly and impartially tried.

The petitioner's argument that such an instruction encourages the jury to ignore mitigating evidence overlooks the fact that the charge specifically directs the jury to consider all of the evidence, including mitigating evidence. Therefore, no reasonable juror could interpret the charge as anything but an admonition to abandon preexisting personal sympathies and prejudices and to decide the issue solely upon the evidence of aggravating circumstances and mitigating factors. The state Court of Appeals correctly held that the instruction tends "to insure that the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute as opposed to the individual juror's personal biases or sympathies." (Opinion of the Court of Appeals, p. 82).

The petitioner has stated that the requisite inquiry is "whether a reasonable juror would perceive the intruction as a directive to ignore mitigating evidence." (Petition for Writ of Certiorari, p. 19). The following statement made by this Court in California v. Brown, 479 U.S. 538, at 542 (1987), is equally

applicable in the case at hand:

> Even a juror who insisted on focusing on this one phrase in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase.

Finally, it should be noted that no objection to the instruction was interposed at trial. Consequently, any arguable error was waived under Ohio Criminal Rule 30.

IV

MIRANDA WARNINGS ARE REQUIRED ONLY WHEN A STATEMENT IS ELICITED BY INTERROGATION OF A PERSON WHO IS IN CUSTODY; A PRISON INMATE IS NOT AUTOMATICALLY "IN CUSTODY" FOR PURPOSES OF MIRANDA.

Immediately after the slaying of Mr. Bowling, approximately thirty inmates, including the petitioner, were detained in the sheet metal shop where the murder had occurred. The inmates were to be searched, one at a time, primarily for reasons of institutional security, and secondarily to discover and preserve evidence of the crime. When the correctional officers began the process of searching the thirty inmates, they had no reason to suspect any one inmate over the others. However, when the officers discovered blood on the shorts of the second or third inmate they searched, the petitioner approached the officers and, without any questioning at all, told the officers to let the other inmate go because he had nothing to do with it. They searched Bradley next. Upon noticing a spot on his shirt, Officer Seth asked him what it was; Bradley said it was blood; Seth asked him where it came from; Bradley said "from over there"; Officer Taylor asked "Why, did you do that?"; Bradley said that he did. At that point, they handcuffed Bradley and escorted him to a correctional cell.

The petitioner has claimed that the dialogue with Bradley should have been suppressed because he was not provided with

warnings pursuant to this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966). However, the Miranda decision requires that warnings be given only when two factors, to-wit: both custody and interrogation, are present. Neither factor was present in this case.

The petitioner has cited Mathis v. United States, 391 U.S. 1 (1968) for the proposition that an individual who is imprisoned is always "in custody" for Miranda purposes. His reading of the Mathis decision is entirely too broad.

> Mathis clearly holds that the fact that a defendant is imprisoned on an unrelated matter does not necessarily remove the necessity for Miranda warnings. Nothing in that opinion, however, suggests that an inmate is automatically 'in custody' and therefore entitled to Miranda warnings, merely by virtue of his prisoner status.

United States v. Conley, 779 F. 2d 970, at 972 (4th Cir. 1985). Accord: Cervantes v. Walker, 589 F. 2d 424 (9th Cir. 1978). The petitioner in this case was not "in custody" for Miranda purposes until he was handcuffed and escorted to detention after making the statements in issue. Prior to that time, the appellant was no more "in custody" for this offense than were the thirty other inmates who were present in the sheet metal shop. Because he was not in custody, no Miranda warnings were required.

Furthermore, regardless of the custody issue, no Miranda warnings were required because there was no interrogation. This Court specifically noted in Miranda that "volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected" by the decision. Id., at 478. Consequently, Miranda is not applicable to statemnets which are "unsolicited, spontaneous and freely made prior to any attempted interrogation." United States v. Savell, 546 F. 2d 43, 46 (5th Cir. 1977). Statements which the defendant volunteers without any questions having been asked of him are admissible despite the absence of prior Miranda warnings. United States v. McGauley, 786

. 2d 888 (8th Cir. 1986). In the present case, the correctional officers had asked n uestions of the appellant, nor had they done anything else to elicit a repsonse from him, when he approached them and told them to let inmate Browder go because he had nothing to do with it. Therefore, that statement was clearly admissible. Although the officers subsequently asked two or three questions of the appellant upon finding the spot on his shirt when he was searched at the scene of the crime, there was no "interrogation" as that term is used in Miranda. in Miranda, this Court expressly recognized the distinction between "interrogation" and "on-the-scene questioning as to facts surrounding a crime," the latter being beyond the reach of the Miranda rule.

The facts in this case are similar to those in United States v. Scalf, 725 F. 2d 1272 (10th Cir. 1984). In that case, shortly after a stabbing, a correctional officer (whose primary function was security rather than investigation or interrogation) asked an inmate (who was soon to become the defendant) "what was going on, what the problem was," to which the defendant responded by saying he did not want to have any problems with the officers, but he just did not like that (victim). The officer then asked the defendant what he did with the knife, and the defendant responded that there were two knives and that he had thrown them out the window. The court held that the officer's conversation with the defendant was nothing more than on-the-scene inquiry to find out what had happened and was not an interrogation requiring Miranda warnings.

There was even less "interrogation" in the instant case, where the on-the-scene exchange was initiated by the appellant himself and not by correctional officers.

CONCLUSION

For all of the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief was served upon Counsel of Record for the Petitioner, Randall L. Porter, Assistant State Public Defender, Ohio Public Defender Commission, 8 East Long Street - 11th Floor, Columbus, Ohio 43266-0587, by depositing the same in the United States Mail, with first class postage prepaid, this 8th day of September, 1989.

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